PECD Bhd (in liqudation) v Amtrustee Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(F)-59–08 OF 2012(W)
ZULKIFLI CJ (MALAYA), RICHARD MALANJUM CJ (SABAH AND SARAWAK), HASHIM YUSOFF, AHMAD MAAROP AND ZAINUN ALI FCJJ
17 OCTOBER 2013

Trusts and Trustees — Quistclose trusts — Beneficiary — Whether person who did not provide or pay trust money could be beneficiary under Quistclose trust — Whether such person could enforce fulfillment of primary trust under Quistclose concept — Whether equity should intervene to do what was just in circumstances of case to prevent abuse of Quistclose concept — Whether dual trusts approach propounded in Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567 still relevant and not rejected by Twinsectra Ltd v Yardley & Others [2002] 2 WLR 802

The respondent was trustee for the holders of Islamic notes ('the noteholders') issued by a wholly-owned subsidiary of the appellant, then a public-listed company. In consideration for the respondent and the noteholders refraining from suing the subsidiary for default in the payment of the notes, the appellant, inter alia, irrevocably and unconditionally guaranteed by a letter of undertaking to pay the respondent RM30m from the proceeds it intended to raise from a rights issue of new ordinary shares towards partial redemption of the Islamic notes. The payment was undertaken to be made not later than seven days of receipt of the proceeds by the appellant. The Securities Commission as well as the shareholders who subscribed to the rights issue shares consented to the appellant's use of the proceeds to redeem part of the Islamic notes. The rights issue exercise raised RM104m and the whole of the proceeds was credited into a special 'PECD Rights Issue Account'. The appellant, however, failed to pay the respondent as it had agreed and within a month it became insolvent after which it refused to pay the respondent any of the monies and sought to undertake a debt restructuring exercise under s 176 of the Companies Act 1965 to settle its debts to its general body of creditors including the respondent. Before the appellant was wound up by order of court, the respondent sued the appellant for payment of the RM30m arguing that that sum was held by the appellant upon trust for the respondent. The High Court agreed and held that the RM30m did not become part of the appellant's general estate in insolvency and was held specifically on a Quistclose trust for the respondent for the sole purpose of paying the noteholders their dues. The Court said the fact the monies were placed in a special rights issue account and not in the company's general account was evidence of that trust. The Court of Appeal affirmed the High Court's decision on appeal. In the instant appeal, the

appellant's sole argument was that because the respondent was neither the provider nor the payor of the RM30m to the appellant, it could not claim a Quistclose trust over that sum in its favour.

Held, dismissing the appeal with costs:

(1) The beneficiary of a Quistclose trust could in law be a person who was not a provider or payor of the trust money (see paras 30 & 69).

(2) In the present case the respondent had acquired the beneficial interest in the monies. The primary trust was a purpose trust enforceable by the respondent as trustee for the noteholders, the actual creditors, for whose benefit the trust was created. The respondent was therefore capable of enforcing the trust (see para 59).

(3) At the appellant's behest, the respondent had granted indulgence to the subsidiary on the appellant's promise and assurance that it would be paid once the monies were received. The appellant had earmarked that the RM30m (specific property) it received before it became insolvent and was wound up was to be paid to the respondent as trustee for the noteholders. The RM30m came from the subscriptions of the appellant's shareholders who knew in advance that the said sum, which was credited into a special 'PECD Rights Issue Account', was for the respondent. Thus the intention was made clear and the primary trust was capable of being carried out (see paras 57–58).

(4) The facts and circumstances of the case required the exercise of flexibility to achieve the ends of justice. To allow the liquidators of the appellant to keep the RM30m was grossly unfair and unjust to the noteholders and to the respondent as their trustee. The appellant had the RM30m in hand before it was wound up and it could have easily paid the respondent but it refused to do so. It completely ignored its obligation and assurance to the respondent. It was unconscionable in equity for a person to obtain money on terms as to its application and then disregard the terms on which it was received. Such conduct went beyond a mere breach of contract (see paras 63–64).

(5) There was merit in the respondent's stand that the appellant did not provide the RM30m and as such it did not have beneficial interest in it that would have entitled it to make a claim for that sum in the event the specific purpose could not be fulfilled. The courts must be vigilant to prevent abuse of the Quistclose concept as there might be a situation where the primary trust failed and the question arose as to who would be entitled to the monies if the party holding it, as the appellant in the present case, did not have any beneficial interest in it (see paras 66–67).

(6) The court agreed and accepted the principle set out in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 that where a loan was made

for the purpose of paying identified existing creditors, and if the borrower became insolvent and there was a dispute between those creditors and the lenders, the creditors should succeed if the primary purpose was still capable of being carried out. The two trusts approach propounded in that case — a primary trust in favour of the creditors and a secondary trust in favour of the lenders — was still relevant depending on the facts of the case and there was no merit in the contention that that approach had been rejected by the House of Lords in its subsequent decision in *Twinsectra Ltd v Yardley & Others* [2002] 2 WLR 802 (see paras 54 & 61).

[Bahasa Malaysia summary

Responden adalah pemegang amanah untuk pemegang-pemegang nota-nota Islam ('pemegang nota tersebut') yang dikeluarkan oleh subsidiari milik penuh perayu, yang pada masa itu syarikat tersenarai awam. Sebagai balasan kepada responden dan pemegang nota tersebut yang telah menahan daripada menyaman subsidiari itu kerana kegagalan membuat bayaran untuk nota-nota itu, perayu, antara lain, yang tidak boleh ditarik balik dan tanpa syarat dijamin oleh surat aku janji untuk membayar RM30 juta kepada responden daripada hasil yang mana ia bertujuan untuk meningkatkan daripada terbitan hak saham biasa baru terhadap penebusan sebahagian daripada nota Islam. Bayaran yang dijanjikan itu perlu dibuat tidak lewat daripada tujuh hari daripada penerimaan hasil oleh perayu. Suruhanjaya Sekuriti dan juga pemegang-pemegang saham yang melanggan terbitan hak saman telah bersetuju kepada penggunaan hasil itu untuk menebus sebahagian daripada nota Islam tersebut. Amalan terbitan hak itu menghasilkan RM104 juta dan keseluruhan hasil itu telah dikreditkan ke dalam 'Akaun Terbitan Hak PECD' khas. Perayu, bagaimanapun, telah gagal untuk membayar responden sebagaimana yang telah dipersetujuinya dan dalam masa sebulan ia menjadi tidak solven yang mana selepas itu ia enggan untuk membayar responden apa-apa wang dan memohon untuk melaksanakan langkah-langkah penyusunan semula hutang di bawah s 176 Akta Syarikat 1956 bagi menyelesaikan hutangnya kepada badan am pemiutangnya termasuk responden. Sebelum perayu digulungkan melalui perintah mahkamah, responden telah menyaman perayu untuk bayaran RM30 juta dengan berhujah bahawa jumlah tersebut dipegang oleh perayu atas amanah untuk responden. Mahkamah Tinggi bersetuju dan memutuskan bahawa RM30 juta tidak menjadi sebahagian daripada harta am perayu dalam insolvensi dan telah diputuskan secara spesifik atas amanah Quistclose untuk responden bagi tujuan semata-mata membayar pemegang-pemegang nota itu hutang mereka. Mahkamah mengatakan fakta yang wang itu diletakkan dalam akaun terbitan hak khas dan bukan dalam akaun am syarikat adalah bukti tentang amanah tersebut. Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi atas rayuan. Dalam rayuan ini, satu-satunya hujah perayu adalah oleh kerana responden bukan pemberi atau pembayar RM30 juta itu kepada perayu, ia

tidak boleh menuntut amanah Quistclose ke atas jumlah tersebut bagi pihaknya. A

Diputuskan, menolak rayuan dengan kos:

(1) Benefisiari suatu amanah Quistclose dari segi undang-undang adalah seorang yang bukan pemberi atau pembayar wang amanah itu (lihat perenggan 30 & 69). B

(2) Dalam kes ini responden memperoleh kepentingan benefisiari dalam wang itu. Amanah primer merupakan amanah bertujuan yang boleh dikuatkuasakan oleh responden sebagai pemegang amanah untuk pemegang nota tersebut, pemiutang sebenar, yang mana faedah terhadap amanah itu diwujudkan. Responden dengan itu mampu menguatkuasakan amanah itu (lihat perenggan 59). C

(3) Atas perintah perayu, responden telah memberikan kelonggaran kepada anak syarikat berdasarkan janji perayu dan jaminan bahawa ia akan dibayar apabila wang diterima. Perayu telah memperuntukkan bahawa RM30 juta (harta tertentu) ia menerima sebelum ia menjadi tidak solven dan dibubar adalah untuk dibayar kepada responden sebagai pemegang amanah bagi pemegang nota. RM30 juta itu datang daripada langganan pemegang saham perayu yang mengetahui terlebih dahulu bahawa jumlah tersebut, yang telah dikreditkan ke dalam 'Akaun Terbitan Hak PECD' khas, adalah untuk responden. Oleh itu niat itu telah diperjelaskan dan amanah primer tersebut mampu dilaksanakan (lihat perenggan 57–58). D E F

(4) Fakta dan keadaan kes memerlukan langkah-langkah fleksibel untuk mencapai keadilan. Dengan membenarkan penyelesai perayu menyimpan RM30 juta itu adalah tidak adil kepada pemegang nota dan kepada responden sebagai pemegang amanah mereka. Perayu memegang RM30 juta itu sebelum ia digulungkan dan ia boleh dengan mudah membayar responden tetapi ia enggan berbuat demikian. Ia langsung tidak menghiraukan tanggungjawab dan jaminannya kepada responden. Adalah tidak berpatutan dalam ekuiti bagi seseorang untuk mendapatkan wang ke atas terma tentang permohonannya dan kemudian tidak mengambil kira syarat-syarat atas mana ia telah diterima. Kelakuan sedemikian telah melampaui pelanggaran kontrak semata-mata (lihat perenggan 63–64). G H

(5) Terdapat merit dalam pendirian responden bahawa perayu tidak memperuntukkan RM30 juta itu dan oleh demikian tidak mempunyai kepentingan benefisiari ke atasnya yang memberinya hak untuk membuat tuntutan untuk jumlah tersebut sekiranya tujuan spesifik itu tidak dapat dipenuhi. Mahkamah perlu berhati-hati bagi mengelakkan penyalahgunakan konsep Quistclose kerana mungkin terdapat keadaan I

di mana amanah primer itu gagal dan persoalan yang timbul berhubung siapa yang akan mempunyai hak ke atas wang itu jika pihak yang memegangnya, seperti mana perayu dalam kes ini, tidak mempunyai kepentingan benefisiari ke atasnya (lihat perenggan 66–67).

(6) Mahkamah bersetuju dan menerima prinsip yang ditetapkan dalam kes *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 bahawa di mana pinjaman dibuat bagi tujuan membayar pemiutang-pemiutang dikenalpasti yang sedia ada, dan jika peminjam menjadi muflis dan terdapat pertikaian antara pemiutang-pemiutang dan pemberi pinjaman tersebut, pemiutang-pemiutang patut berjaya jika tujuan utama masih boleh dilaksanakan. Pendekatan dua amanah yang dikemukakan dalam kes tersebut — amanah primer bagi pihak pemiutang-pemiutang dan amanah sekunder bagi pihak pemberi pinjaman — masih relevan bergantung kepada fakta kes dan tiada merit dalam hujah bahawa pendekatan itu telah ditolak oleh House of Lords dalam keputusan berikutnya dalam kes *Twinsectra Ltd v Yardley & Others* [2002] 2 WLR 802 (lihat perenggan 54 & 61).]

Cases referred to

Barclays Bank Ltd v Quistclose Investments Ltd [1970] AC 567, HL (folld)
Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd [1985] 1 Ch 207, Ch D (consd)
Chwee Kin Keong and Others v Digilandmall.com Pte Ltd [2005] 1 SLR(R) 502, CA (consd)
Cooper v PRG Powerhouse Ltd (in creditor's voluntary liquidation) [2008] 2 All ER (Comm) 964, Ch D (refd)
Denley's Trust Deed, Re, Holman v H H Martyn & Co Ltd [1969] 1 Ch 373, Ch D (consd)
Northern Development (Holdings) Ltd (Chancery Division, 6 Oct 1978) (unreported), Ch D (consd)
Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd [2012] 4 MLJ 1, FC (refd)
Twinsectra Ltd v Yardley [2002] 2 WLR 802, HL (consd)
Wilson v Church (1879) 13 Ch D 1, CA (refd)

Legislation referred to

Companies Act 1965 s 176

Appeal from: Civil Appeal No W-02–1859 of 2009 (Court of Appeal, Putrajaya)

Loh Siew Chiang (Abdullah Abdul Rahman and Choo Jun Lin with him) (Cheng & Ariff) for the appellant.
Yoong Sin Min (Lau Kee Sern and Cheah Faan Jin with him) (Shook Lin & Bok) for the respondents.

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

INTRODUCTION

[1] In this appeal the sole ground submitted by the appellant is that the Court of Appeal erred in law in dismissing the appellant's appeal and upholding the High Court's decision that the sum of RM30m was impressed with a Quistclose trust in favour of the respondent under circumstances where the respondent had neither provided nor paid the money under consideration to the appellant.

[2] The dispute over the RM30m ('the said monies') arose because the appellant has been wound up. If the appellant were to pay up the said monies to the respondent it could tantamount to unlawful preference over the other unsecured creditors of the appellant. Hence, in order to overcome such hindrance the respondent had to establish that the said monies was held by the appellant under a trust. It is for that reason that the respondent filed an action which led to this present appeal.

BACKGROUND FACTS

[3] The appellant had a wholly owned subsidiary, PECD Jaya Holdings Sdn Bhd (formerly known as Peremba Jaya Holdings Sdn Bhd ('the subsidiary'). On 14 October 2004, the subsidiary executed a *Murabahah* Notes Issuance Facility Agreement ('facility agreement'). Pursuant to the facility agreement, the subsidiary issued Islamic notes ('the notes') of up to RM200m. There were 14 investors which took up the notes ('the noteholders'). The respondent became the trustee for the noteholders under a trust deed dated 14 October 2004 which was later amended by a supplementary trust deed dated 17 October 2005.

[4] In 2007, the subsidiary defaulted in the payment of the notes. The respondent and the noteholders therefore decided to commence legal action against the subsidiary. However, the appellant, then a public listed company and the holding company of the subsidiary, requested from the noteholders indulgence for the subsidiary. And by a letter dated 11 July 2007 ('the letter') the respondent granted indulgence to the subsidiary. And in consideration for such indulgence given, the appellant agreed that from the proceeds of the appellant's proposed rights issue exercise, a sum of RM30m would be paid to the respondent for the partial redemption of the notes.

[5] A letter of undertaking issued on 1 August 2007 ('letter of undertaking') was also given by the appellant to the respondent for the indulgence. The letter of undertaking stipulated that the sum of RM30m received from the proceeds of the rights issue exercise would be paid to the respondent towards partial payment of monies owing under the notes. And such payment would be made not later than seven days after the date of receipt by the appellant of such proceeds.

[6] The relevant portions of the letter of undertaking read:

> 3. Pursuant to the terms of the Letter, and in consideration of the grant of the indulgence of time and the premises and for better securing the due performance and discharge by the Issuer of the Murabahah Secured Amounts under the MUNIF/MMTNs Facility Agreement, the Trust Deed and the other issue Documents, we hereby irrevocably and unconditionally agree, undertake with and guarantee to you as the MUNIF/MMTNs Trustee as a continuing obligation that:-
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> (a) if the Murabahah Secured Amounts is not less than Ringgit Malaysia Thirty Million (RM30,000,000.00), we will pay or cause, and ensure the payment of at least Ringgit Malaysia Thirty Million (RM30,000,000.00) from the proceeds.raised or to be raised from the proposed renounceable rights issue of new ordinary, shares of RM0.50 each in the Company together with warrants ('Proposed Rights Issue which expression shall include any variations, modifications or substitutions thereto) to you as the MUNIF/MMTNs Trustee towards payment or settlement of the Murabahah Secured Amounts or any part thereof for the benefit of the Noteholders and such Payment shall be made by the Company to the MUNIF/MMTNs Trustee not later than seven (7) days after the date of receipt by the Company of such proceeds from the Proposed Rights issue;
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> (b) if the Murabahah Secured Amounts is less than Ringgit Malaysia Thirty Million (RM30,000,000.00) ('Outstanding Balance'), we will pay or cause and ensure the payment of a sum equivalent to the Outstanding Balance from the proceeds raised or to be raised from the Proposed Rights issue to you as the MUN1F/MMTNs Trustee as payment or settlement of the Outstanding Balance tor the benefit of the Noteholders and such payment shall be made by the Company to the MUNIF/MMTNs Trustee not later than seven (7) days after the date of receipt by the Company of such proceeds from the Proposed Rights issue;
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> (c) we will not make any repayment and/or prepayment of all or any loan or advance obtained by the Company from any of its shareholders until and unless the Murabahah Secured Amounts shall have been fully settled, whether through re-purchase or redemption of the Notes in accordance with the terms of the Said Letters, the MUNIF/MMTNs Facility Agreement and the Trust Deed; and
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> (d) we will execute and do and/or cause to be executed and done all such assurances, acts and things necessary or as the MUNIF/MMTNs Trustee may require from time to time for perfecting and/or protecting the rights

of the MUNIF/MMTNs Trustee under this letter including but not limited to procuring and obtaining all relevant consents and approvals (including, where applicable, approvals of the Securities Commission and the shareholders of the Company) relating to the change in utilisation of the proceeds raised or to be raised from the Proposed Rights Issue, and the non-repayment/prepayment of all or any loan or advance obtained by the Company from any of its shareholders as aforesaid.

4. We hereby further irrevocably and unconditionally:-

(a) agree, acknowledge and confirm with and to you as the MUNIF/MMTNs Trustee that an Event of Default shall be deemed to have been committed if any provision of this undertaking is breached; and

(b) undertake and agree to keep the MUNIF/MMTNs Trustee and the Noteholders fully and effectually indemnified against all losses, claims, damages, costs, charges and expenses whatsoever, arising out of or in connection with any failure on the part of the Company and/or the Issuer to perform any of its/their respective obligations under or in respect of or arising from this letter, the MUNIF/MMTNs Facility, the MUNIF/MMTNs Facility Agreement, the Trust Deed or the other Issue Documents including without limitation the MUNIF/MMTNs Trustee's solicitors' costs (on a solicitor and client and fully indemnity basis, including any service tax payable) in seeking to enforce or enforcing this letter or any other security for or obtaining or seeking to obtain payment of all or any part of the sums guaranteed.

5. This undertaking is made without affecting in any way whatsoever the Issuer's obligations under the MUNIF/MMTNs Facility Agreement, the Trust Deed and the other Issue Documents, and is made in full knowledge and awareness of the reliance by the Noteholders on this undertaking as an inducement or basis for the Noteholders' agreement to, inter alia, grant the indulgence as per the terms and conditions of the Letter.

6. This undertaking in its entirety shall be governed by and construed in accordance with the laws of Malaysia and shall bind our successors in title.

Signed:

Tai Keat

Director

1.8.2007

[7] The rights issue exercise was for the appellant to raise fresh funds from the appellant's shareholders. Thus, on 18 September 2007, the appellant, as required by law issued a circular to its public shareholders on the rights issue. An addendum to the circular was also issued. It was an invitation to the shareholders to attend an extra ordinary general meeting ('EGM') so that they could vote on a resolution for a proposed rights issue exercise that would involve 345 million new shares to be issued.

[8] On 10 October 2007, the appellant's shareholders passed the resolution in favour of the rights issue exercise. The Securities Commission ('SC') and Bursa Malaysia Bhd ('BMB') had earlier, on 26 September 2007 approved the appellant's proposed rights issue exercise. An abridged prospectus was also issued to the appellants' shareholders on 30 October 2007 setting out the deadlines for subscriptions of the rights issue shares and also affirming what was set out in the circular.

[9] In fact in its letter dated 30 October 2007 to the entitled shareholders the appellant stipulated that the utilisation of the proceeds of the exercise would include the payment of the said monies being the partial redemption of the notes which is to be effected within three months from the receipt of the proceeds. The shareholders who subscribed to the rights issue shares were thus well informed on the proposed utilisation of the proceeds of the exercise.

[10] By 30 November 2007, the rights issue shares were duly subscribed for by the shareholders and listed on Bursa Malaysia. The exercise was successful in that a sum of RM104,168,256 was raised from the subscribers of the rights issue shares. The whole of the proceeds was credited into a special account called the 'PECD RIGHTS ISSUE Account'. However, upon receipt of the proceeds, the appellant did not pay the respondent the said monies to the respondent within 'seven (7) days after the date of receipt by the Company of such proceeds from the Proposed Rights issue' as stated in the letter of undertaking.

[11] And by the end of December 2007, the appellant became insolvent. On 11 January 2008 it formally refused to pay the said monies to the respondent. Instead it wrote to the respondent explaining that it was intending to put forward proposals for debt restructuring and that it would not be able to pay the respondent the said monies. It also requested for more time to resolve the situation. The respondent disagreed with the proposals.

[12] And due to the financial difficulties of the appellant it ended up being listed as a PN17 company by Bursa Malaysia. Under the relevant rules of Bursa Malaysia the appellant must resolve its financial difficulties within the prescribed time frame failing which it would be delisted from the exchange.

[13] Notwithstanding the disagreement by the respondent on the debt restructuring proposals the appellant proceeded with its restructuring scheme pursuant to s 176 of the Companies Act 1965 ('the scheme') in which the said monies formed the substantial part of the RM35m in cash to be distributed to its creditors including the respondent.

[14] An ex parte Originating Summons No D2–24–63 of 2008 ('the first OS') was thus filed in the High Court on 5 March 2008 by the appellant together with another of its subsidiaries, PECD Construction Sdn Bhd ('PCSB') for leave to convene a creditor's meeting to consider the scheme of arrangement and for a restraining order of 90 days. The first OS was dismissed by the High Court on 24 April 2008.

[15] On 9 May 2008 the Court of Appeal allowed the appeal by the appellant and PCSB against the High Court refusal but granted only a 60 days restraining order expiring on 9 July 2008 ('first RO').

[16] On 3 July 2008 the appellant and PCSB applied under the first OS for an extension of the first RO for another 30 days from 9 July 2008. However the application was dismissed by the High Court on 29 July 2008 and an appeal to the Court of Appeal was also dismissed.

[17] At a creditor's meeting held on 1 August 2008 the scheme of arrangement presented by the appellant and PCSB was also rejected by the creditors.

[18] Undaunted, on 13 August 2008 the appellant and its related companies applied again to the High Court by way of Originating Summons No D2–24–336 of 2008 ('the second OS') for leave to convene a creditor's meeting to consider another scheme of arrangement under the same s 176 of the Companies Act 1965 and for another restraining order of 90 days. On 18 August 2008 the appellant and its related companies obtained an ex parte restraining order ('the second RO').

[19] But on 27 February 2009 on the application by the respondent the High Court set aside the second RO. The appellant and its related companies appealed to the Court of Appeal and on 8 April 2009 their appeal was dismissed. Their application for leave to appeal was also dismissed by the Federal Court.

AT THE HIGH COURT

[20] On 7 May 2009 the respondent commenced an action against the appellant for the payment of the said monies ('the respondent's action').

[21] The relief prayed for by the respondent, as the plaintiff and the appellant as the defendant, were, inter alia:

(a) a declaration that a sum of RM30 million from the proceeds received by the Defendant from the Defendant's rights issue of shares exercise, pursuant to various notices, circulars and an Abridged Prospectus issued to the Defendant's shareholders and the legislation governing the same, and pursuant to the Defendant's Letter of Undertaking dated 1.8. 2007 issued to the Plaintiff, is held on trust by the Defendant for the Plaintiff and that the Defendant is obliged to pay such sum to the Plaintiff;

(b) an order that the Defendant pay to the Plaintiff the said sum of RM30 million within seven (7) days from the date of the Order made herein;

(c) an order that the Defendant do all that is necessary to ensure such payment is effected, including the issuance of a letter to its bankers authorising the release of the said monies to the Plaintiff, within seven (7) days from the date of the Order to be made herein;

(d) such further and other relief as this Honourable Court deems fit.

[22] On 21 August 2009 the application by the respondent was allowed by the High Court.

[23] In her judgment the learned High Court judge said this, inter alia:

> It is clear that the RM30m proceeds which *the defendant received from the rights issue was specifically for the purpose of paving the Murabahah Noteholders* as approved by the Securities Commission and pursuant to a letter of undertaking which was issued by the defendant to the plaintiff. This was also declared in the circular which the defendant had disseminated to its shareholders. *These monies which were for these specific purpose are monies which were held on trust by the defendant in favour of the plaintiff* …
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> There are several cases to support the above contention. The leading one is the case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 at p 580 where Quisclose had granted a loan to a company for a very specific purpose of paying dividends to its shareholders. Subsequently when the monies had been remitted to the company's banker, Barclays bank, the company went into liquidation. Barcklays Bank wanted to exercise a right of set off of these monies but Quistclose claimed them as trust monies, as the monies were for a very specific purpose. It was held by the House of Lords that:
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> > That arrangement of this character for the payment of a- person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases …
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> The basis for the decision was thus clearly stated viz, that the money advanced for the specific purpose did not become part of the bankrupts estate.

Thus from the above cases it clearly shows that the monies which was to be applied for a specific purpose, as in our present case for the sole purpose of paying the plaintiff as trustee. A relationship of a fiduciary character had been established in favour of the trustee who was to receive payment on a primary trust …

Therefore the more reason for the defendant to utilise for what it had been approved initially. It cannot now renege on this issue. That would be misleading and misrepresentation on its true intention of raising the monies in the first place. Any utilisation of the RM30m contrary to what it had been originally intended when it was approved by the Securities Commission would be contrary to the provisions of the Capital Markets and Services Act 2007. That would certainty attract the penal provision of the same …

There has not been any proof in the affidavits to show that the SC has approved of any variation as to the utilisation of the RM 30 million.

Furthermore it is to be noted that a circular was issued to the defendant's shareholders informing them as to the specific purpose of the RM30m. To detract from this very purpose would amount to defrauding and misleading its shareholders.

Another contention by the defendant is with regards to the PECD Rights Issue Account which consists of rights issue proceeds were mixed with the RM30m and the defendant submits that it does not mean that a trust was created. *However the fact that the monies was to be placed in the rights issues account by the subscribers shows an element of trust being created.* These monies are for a specific purpose as approved by the Securities Commission and it is not to be used to the discretion of the defendant. This special account denotes that it is to be separate from the defendants own general account and the defendant does not have a free hand to deal or utilise the monies for any other purpose other than what had been approved by the Securities Commission. (Emphasis added.)

[24] Dissatisfied the appellant appealed to the Court of Appeal on 24 August 2009.

[25] Meanwhile on 2 October 2009 the appellant was ordered to be wound up pursuant to the Shah Alam High Court Petition No 28–140 of 2008.

AT THE COURT OF APPEAL

[26] On 9 February 2012 the Court of Appeal dismissed the appeal by the appellant against the decision of the High Court in the respondent's action.

[27] The Court of Appeal endorsed the factual findings and conclusion of the learned High Court judge. In its judgment it said, inter alia:

Coming back to the judgment of *the learned judge herein wherein she found that the facts establishes the existence of a Quistclose trust* it is only appropriate to appraise ourselves of the characteristics of a Quistclose trust.

A The Quistclose case was a case where Quistclose had granted a loan to a company for a very specific purpose of paying dividends to its shareholders. Subsequently when the monies had been remitted to the company's banker, Barclays Bank, the company went into liquidation, Barclays Bank wanted to exercise the right of set off of these monies but Quistclose claimed them as trust monies, as the monies were for a very B specific purpose …

…

It is noteworthy that in the factual matrix herein *the subscribers for the appellant's shares do not envisage a return of their share subscription because they have received their* C *rights shares. Thus, the monies in our view became held on trust for the intended recipient which is the respondent.*

…

In the final analysis we do not see any appealable error on the part of the learned D High Court judge her findings was based on the available evidence placed before her and her evaluation of same before arriving at her findings. She did not err in the application of the relevant legal principles on to the facts of the case. The appeal is accordingly dismissed with costs and the decision and order of the High Court affirmed. (Emphasis added.)

E

[28] Clearly therefore the courts below held that a 'relationship of a fiduciary character had been established in favour of the trustee (respondent) who was to receive payment on a primary trust'. And the reference to the case of *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567 indicated that the courts F below understood the trust to be a Quistclose trust.

[29] Whilst the Court of Appeal appreciated the fact that the subscribers of the rights issue shares did not 'envisage a return of their share subscription G because they have received their Rights Shares' and therefore could not be described as the lenders of the said monies, it went on to hold that 'the monies in our view became held on trust for the intended recipient which is the respondent'. And with respect the Court of Appeal seemed to say that the event had satisfied the requirements or elements of a Quistclose trust as propounded H by Lord Wilberforce in *Barclays Bank Ltd v Quitclose Investments Ltd* despite the fact that the respondent was not the provider of the said monies.

AT THE FEDERAL COURT

I **[30]** On 12 August 2012 this court granted leave to the appellant on the sole question of:

Whether the beneficiary of a Quistclose can in law be a person who is not a provider or payor of the money ('the leave question').

CONTENTIONS OF THE PARTIES

[31] Learned counsel for the appellant concluded his submission by saying that a beneficiary of a Quistclose trust cannot in law be a person who is not the provider or payor of the money. He premised his conclusion on the following arguments, namely:

(a) that although the Court of Appeal dismissed the appellant's appeal in the second OS the majority judgment found that the said monies was not held by the appellant on a Quistclose trust for the respondent;

(b) that in the majority judgment of the Court of Appeal in the second OS was right when it held:

> … that the note holders were not beneficiaries of the sum under a trust less so a Quistclose trust. Unlike in Quistclose the note holders were not the provider of the fund. The subscribers paid the money to buy the rights issue shares from the first appellant as opposed to the paying the note holders the sum due from the first or the second appellant under the notes. The note holders' recourse is an action against PECD Jay a Holdings Sdn Bhd (the subsidiary of the notes) or against the first appellant (the holding company of PECD Jaya Holdings Sdn Bhd) to enforce its undertaking to repay the notes. The note holders stand in the same position as any unsecured creditors in respect of the debt owed on the notes in the event that the fitst appellant is wound up before it settles the notes;

(c) that the High Court and the Court of Appeal in the respondent's action erroneously applied the Quistclose trust principle;

(d) that based on the reasonings in *Barclays Bank Ltd v Quistclose Investments Ltd* and *Twinsectra Ltd v Yardley* [2002] 2 WLR 802 the 'only possible trust is a resulting trust for the lender (or provider of funds) and that a direction to the borrower to apply the money for a stated purpose does not create a trust in favour of a third party or the ultimate recipient';

(e) that 'where the purpose underlying the payment fails, the payor (the lender or the provider of funds) is the resulting beneficiary and not any third party';

(f) that the right issue shares having been duly subscribed and alloted to the subscribers, the said monies had therefore become part of the appellant's share capital;

(g) that the concept of primary trust and secondary trust as propounded in *Barclays Bank Ltd v Quistclose Investments Ltd* had already been rejected in *Twinsectra Ltd v Yardley* yet the Court of Appeal only gave it a cursory approach;

(h) that the 'Respondent's remedy against the appellant was therefore solely a contractual remedy' based on the letter of undertaking;

(i) that at best the respondent is only an unsecured creditor;

(j) that the Circular issued by the 'appellant was merely an invitation to the appellant's shareholders to subscribe to the Proposed Rights Issue and thus to acquire the Rights Issue shares';

(k) that the combined effect of the letter of undertaking and the circular 'cannot support any case for the creation of a trust fund of RM30 million to be held by the Appellant as trustee on a primary trust for the Respondent'; and

(l) that to impress 'the RM30 million with a trust in favour of the Respondent' would elevate the respondent to a preferred creditor and would be 'unjustly enriched at the expense of the general body of unsecured creditors'.

[32] In response, learned counsel for the respondent contended by way of several prongs approach:

(a) that the appeal would be academic and would not alter the result of the decision of the Court of Appeal. The leave question does not cover the finding of the Court of Appeal on unconscionability. It would be unconscionable for the appellant not to apply the said monies for the specific purpose or for refusing to pay it to the respondent;

(b) that on the concept of Quistclose trust, that is, any 'arrangement for the payment of a person's creditors by a third person, give rise to a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors, and secondarily, if the primary trust fails, of the third person' (see *Barclays Bank Ltd v Quistclose Investments Ltd*), the said monies was impressed with Quistclose trust in favour of the respondent. Accordingly on that concept the respondent would be the creditor, the third party would be the subscribers who paid for the right shares and the person or bankrupt whose creditors were supposed to be paid from the arrangement would be the appellant. The elements of such trust have been satisfied. The purpose of the said monies was clearly specified, that is, to pay dividends to the noteholders and such purpose was known to all relevant parties. The appellant did not provide the said monies and as such the appellant did not have the beneficial interest in it that would have entitled the appellant to make a claim for it in the event the specific purpose could not be fulfilled;

(c) that the court should not be seen to come in aid a contravention of law. The said monies was part of the funds exercise raised by way of subscriptions from the public and shareholders of the appellant, a public

listed company. The exercise was approved by the relevant authorities including Securities Commission and Bursa Malaysia Bhd. Any diversion of the fund would be contrary to the intended purpose;

(d) that giving the said monies to the appellant would effectively give benefit to one creditor pursuant to an arrangement made between the creditor and the liquidators of the appellant; and

(e) that there was concurrent findings of the courts below that the said monies was for a specific purpose which was also known by the appellant.

UNCONSCIONABILITY POINT

[33] Before dealing with the leave question we would first deal with the unconscionability point raised by learned counsel for the respondent.

[34] We have read and considered the judgment of the Court of Appeal on the unconscionability point. With respect, we do not think the Court of Appeal was relying on it as an independent ground. It was referred to in relation to the discussion on trust upon the said monies. As such there is no merit to say that the leave question, even if answered in favour of the appellant, would be an academic exercise. In any event the pleadings of the respondent did not include as a cause of action the doctrine of unconscionability (see *Sumatec Engineering and Construction Sdn Bhd v Malaysian Refining Co Sdn Bhd* [2012] 4 MLJ 1).

THE LEAVE QUESTION

[35] In respect of the leave question we find that it accepted, albeit impliedly, as a fact or at least presupposes, that the 'various notices, circulars and an Abridged Prospectus issued to the Defendant's shareholders (Appellant) and the legislation governing the same, and pursuant to the Defendant's Letter of Undertaking dated 1.8. 2007 issued to the Plaintiff (Respondent)' (collectively called 'the various documents') had created a trust, in particular a Quistclose-type of trust. Otherwise the obvious question should have been whether the various documents created a trust in favour of the respondent. Hence, we find no merit in the submission of learned counsel for the appellant that the combined effect of the letter of undertaking and the circular 'cannot support any case for the creation of a trust fund of RM30 million to be held by the Appellant as trustee on a primary trust for the Respondent'.

[36] Accordingly we are left to consider whether the respondent, which did not provide the said monies but identified to receive it, could enforce the trust. In other words, can the respondent claim the said monies?

A THE CONCEPT AND PRINCIPLES

[37] The term 'Quistclose trust' has its origin in the case of *Barclays Bank Ltd v Quistclose Investments Ltd*) where Lord Wilberforce propounded the concept thus:

B

> That arrangements of this character for the payment of a person's creditors by a third party, give rise to a relationship of a fiduciary character of trust, in favour, as a primary trust, of the creditors and secondarily, if the primary trust fails, of the third person, has been recognised in a series of cases over some 150 years.
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> C
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> …
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> The basis for the decision was thus clearly stated viz, that the money advanced for the specific purpose did not become part of the bankrupt's estate.

D

[38] On a plain reading of the concept it seems quite simple to understand and to enforce. Unfortunately, the issue of 'where, pending its application' by the borrower or payee 'is the beneficial interest in the money' was not clarified by Lord Wilberforce. This had led to intense debate among legal commentators as evident by the numerous legal literatures written and published in several leading law reports and journals. The answer is crucial as it leads to a determination of who then can enforce a Quistclose trust.

E

[39] In his article entitled 'The Quistclose Trust: Who Can Enforce it?' and published in (1985) 101 LQR 269, PJ Millett QC (as Lord Millett then was) posed a question: 'A lends a sum of money to B for the specific purpose of enabling him to pay his (B's) creditors or a particular class of them, and for no other purpose. Can the creditors or any of them (C) compel B to apply the money in payment of debts owing to them? Or can A change his mind, release B from the obligation to apply the money only for the specified purpose, and either demand repayment or allow B to spend the money as he chooses for his own purposes? And where, pending its application by B, is the beneficial interest in the money?' He opined an answer: 'The answer to the question raised at the beginning of this article depends on A's intention, to be collected from the language used, the conduct of the parties, and the circumstances of the case'.

F

G

H

[40] Lord Millett also 'considered the possibility of third parties being the beneficiaries of such a trust: 'If A's intention was to benefit C, or his object would be frustrated if he were to retain a power of revocation, the transaction will create an irrevocable trust in favour of C, enforceable by C but not by A. The beneficial interest in the trust property will be in C'.

I

[41] However, in *Twinsectra Ltd v Yardley* Lord Millett did not adopt 'the

possibility of third parties being the beneficiaries of such a trust'. Further, he refused to endorse the classification of Quistclose trust into primary and secondary trust.

[42] After giving his reasons for rejecting the various arguments on the position of the beneficial interest in a Quistclose trust he held that a '*Quistclose trust to be an entirely orthodox example of the kind of default trust known as a resulting trust. The lender pays the money to the borrower by way of loan, but he does not part with the entire beneficial interest in the money, and in so far as he does not it is held on a resulting trust for the lender from the outset.* Contrary to the opinion of the Court of Appeal, *it is the borrower who has a very limited use of the money, being obliged to apply it for the stated purpose or return it. He has no beneficial interest in the money, which remains throughout in the lender subject only to the borrower's power or duty to apply the money in accordance with the lender's instructions. When the purpose fails, the money is returnable to the lender, not under some new trust in his favour which only comes into being on the failure of the purpose, but because the resulting trust in his favour is no longer subject to any power on the part of the borrower to make use of the money. Whether the borrower is obliged to apply the money for the stated purpose or merely at liberty to do so, and whether the lender can countermand the borrower's mandate while it is still capable of being carried out must depend on the circumstances of the particular case*'. (Emphasis added.)

[43] Hence, it would appear that based on what was said by Lord Millett the equitable principle that evolved would be that in a Quistclose trust the beneficial interest would remain with the lender or provider of the money. It is therefore the lender or provider of the money who has the right to enforce the trust in the event the exclusive purpose in the lending or giving of the money failed.

[44] However, it is not exactly correct to say that *Twinsectra Ltd v Yardley* restated the concept as originally propounded by Lord Wilberforce. While Lord Millett said 'that his analysis in Twinsectra 'had the unanimous consent of the other four members of the Appellate Committee', in actual fact 'of the five law lords who heard the Twinsectra case, only Lord Hoffmann and Lord Millett dealt expressly with the basis on which the Quistclose trust arose, and Lord Millett was the only one to consider it in detail.

…

Lord Hoffmann did not refer to the nature of the trust, nor to the primary/secondary trust classification of Lord Wilberforce in *Quistclose* (see *Oxford Journals on Trusts & Trustees*, Vol 18, No 2, February 2012, pp 123–131 by Barrie Lawrence Nathan entitled 'In Defence of The Primary Trust: Quistclose Revisited').

[45] As such, while it might be observed that 'none of the members of the House of Lords dissented from Lord Millett, the only one who agreed with his detailed analysis and criticisms of Quistclose was Lord Hutton. Lords Slynn and Steyn agreed with Lord Hoffman. *The fact remains that the House of Lords decision in Quistclose was a unanimous one, which has not been overruled.* Even Lord Millett merely said that there were 'several difficulties' with Lord Wilberforce's analysis, as applied in Re Northern Developments (Holdings) Ltd' (*Ibid*). (Emphasis added.)

[46] Thus, it can therefore be said that the 'nature of the trust and the location of the beneficial interest remain elusive and continue to be debated by distinguished academic lawyers' (see Lord Millett's Foreword to William Swadling, *The Quistclose Trust: Critical Essays* (Hart Publishing, Oxford and Portland, Oregon 2004).

[47] It is interesting to note that in most, if not all, of the cases relied upon by the learned High Court judge in finding that the said monies was subject to a Quistclose trust, the claimants were either the lenders or providers of the moneys.

(See *Barclays Bank Ltd v Quistclose Investments Ltd*, *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* [1985] 1 Ch 207, *Wilson v Church* (1879) 13 Ch D 1, *Cooper v PRG Powerhouse Ltd (in creditor's voluntary liquidation)* [2008] 2 All ER (Comm) 964). But such situation should not be taken to indicate that it must be the current law. 'The nature of a Quistclose trust may vary according to the circumstances, as Lord Millett now appears to accept' (see note 1).

[48] In fact in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* the claimant was also the provider of the money, Carreras Rothmans Ltd. The claimant sought for a declaration that the 'moneys … standing to the credit of the special account' were held by Freeman Mathews Treasure Ltd (the recipient of the moneys) 'upon trust for the sole purpose of applying the sums in meeting the debts of the third parties'. But it should also be noted that *it was the provider of the money (Carreras Rothmans Ltd) that sought for the balance of the money with payee (Freeman Mathews Treasure Ltd) to be paid to the creditors.* (Emphasis added.)

[49] In *Re Northern Development Holdings Ltd* (Chancery Division, 6 Oct 1978) where the facts and circumstances were quite similar to this present case, Sir Robert Megarry V-C decided in favour of the unsecured creditors over the lenders. The brief facts of that case were that 'Northern was the parent company of a group of companies including Kelly. Kelly was in a bad way financially, and there was the danger that if Kelly were wound up or ceased trading, the whole group would be brought down. Various banks (all of whom had an interest, in that their customers included one or more companies in the

group) advanced money to Northern, to be put into a special account in Northern's name, and to be used to pay off Kelly's unsecured creditors, and to enable Kelly to continue trading. The fund was used for this purpose for a time, and then Kelly went into receivership while a substantial sum remained unexpended. On the issue of whether the unexpended money in the account belonged to the banks, the lender or to Kelly's unsecured creditors, Megarry V-C decided in favour of the unsecured creditors' (SLAPNT@cf.ac.uk). He applied Lord Wilberforce's analysis in *Barclays Bank Ltd v Quistclose Investments Ltd* and held that 'the primary trust was a purpose trust enforceable (inter alios) by the subsidiaries' creditors as the persons for whose benefit the trust was created' (*Lord Millett in Twinsectra Ltd v Yardley* at para 86). As such the creditors of Kelly were beneficially entitled under a Quistclose trust and could enforce it against the lenders.

[50] Lord Millett in *Twinsectra Ltd v Yardley*, on one hand did not say that the decision of Megarry V-C was wrong but on the other hand he was not persuaded in the reasoning for the following reasons:

(a) that the case referred to by Lord Wilberforce related to negative injunction to restrain improper application of the money and not a mandatory order to compel performance. As such there was no issue of performance being enforced by the creditors;

(b) that 'the purpose of the arrangements was not, as in other cases, to enable the debtor to avoid bankruptcy by paying off existing creditors, but to enable the debtor to continue trading by providing it with working capital with which to incur fresh liabilities. There is a powerful argument for saying that the result of the arrangements was to vest a beneficial interest in the subsidiary from the start. If so, then this was not a Quistclose trust at all';

(c) that the 'banks had their own commercial interests to protect by enabling the subsidiary to trade out of its difficulties. If so, then the primary trust cannot be supported as a valid non-charitable purpose trust'; and

(d) that 'the primary trust was for an abstract purpose with no one but the lender to enforce performance or restrain misapplication of the money. It is simply not possible to hold money on trust to acquire unspecified property from an unspecified vendor at an unspecified time. There is no reason to make an arbitrary distinction between money paid for an abstract purpose and money paid for a purpose which can be said to benefit an ascertained class of beneficiaries, and the cases rightly draw no such distinction. Any analysis of the Quistclose trust must be able to accommodate gifts and loans for an abstract purpose'.

[51] Despite the criticism by Lord Millett of the decision by Megarry V-C

the issue remained unsettled. Lord Millett acknowledged it later on. In his Foreword to William Swadling, 'The Quistclose Trust: Critical Essays (Hart Publishing, Oxford and Portland. Oregon 2004' he wrote:

> It was too much to hope that a single decision of the House of Lords would put an end to controversy.
>
> *The nature of the trust and the location of the beneficial interest remain elusive and continue to be debated by distinguished academic lawyers.*
>
> They demand to know whether the Quistclose trust is a form of express, implied, constructive or resulting trust. If the mere author of a foreword may venture to intrude in a private dispute (at the risk of exposing himself to derisive comment from all sides), I would say that it may be any of them, depending on the facts of the particular case and the boundaries between these various forms of trust, on which not everyone is agreed. (Emphasis added.)

[52] In a recent article published in the *Oxford Journals on Trusts & Trustees*, Vol 18, No 2, February 2012, pp 123–131 by Barrie Lawrence Nathan entitled *In Defence of The Primary Trust: Quistclose Revisited* ('Nathan's article') the learned author argued that the decision of Megarry V-C on the given facts and circumstances produced a just and fair result. He wrote, inter alia:

> The original judgment of the House of Lords in Quistclose found that there were two trusts: a primary trust in favour of the creditors and a secondary trust in favour of the lenders. That approach has been criticized by academic writers and by the House of Lords in the later case of *Twinsectra Ltd v Yardley*. The purpose of this article is to examine what rights creditors may have where a loan has been made for the sole purpose of paying them and the borrower becomes insolvent before payment is made. It will be argued that, at least where the loan is made for the payment of specific identified creditors, the original classification of primary and secondary trust is not only correct, but is also more just.
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> …
>
> If the Quistclose trust is established and the purpose for which the loan was made fails, there is now no doubt that the loan is held on trust for the lender and must be returned to him. For practical purposes in a dispute between the lender and the trustee in bankruptcy or liquidator, it makes no difference whether that trust is express, resulting, or constructive. The loan will not form any part of the borrower's assets if there is an insolvency where the purpose has failed, and the lender will get his money back. Nearly, all the cases concerning Quistclose trusts have involved a dispute between the trustee in bankruptcy or liquidator and the lender. *The question of what rights, if any, creditors may have where a loan has been made for the purpose of paving them has received less attention. In respect of such rights, the question of where the beneficial interest in the loan lies before any failure of purpose takes on a practical significance.*
>
> …

In many cases, the loan was made to save the borrower from insolvency, and if that were to be regarded as the purpose of the loan, the purpose would automatically fail once the borrower became insolvent. However, the object of keeping the borrower afloat is more accurately described as motive rather than purpose.

> The trust does not fail merely because the settlor's purpose in creating it has been frustrated: the trust must become illegal or impossible to perform. The settlor's motives must not be confused with the purpose of the trust; the frustration of the former does not by itself cause the failure of the latter (*Ibid*)

…

This objection (This refers to Lord Millett's major criticism that 'the primary/ secondary trust analysis made no provision for the situation where there was no creditor and the loan was for an abstract purpose; this would offend the beneficiary principle as there would be no one to enforce the trust'), it is submitted, would not apply where the loan is nominally for a purpose, but there is a specific property and there are specific creditors who can be identified and would be capable of enforcing the trust on Re Denley principles [1969] 1 Ch 373. On this basis, in the circumstances considered above, in *Re EVTR*, Quantel would have been able to enforce the trust to purchase the equipment from them. In *Twinsectra* itself, if a stricter view had been taken of the purpose, the vendor of the original property at Apperley Bridge could have been identified as the beneficiary under a primary trust.

If those circumstances do not apply, it may be that the trust which arises where there are creditors is different from the trust which arises where the loan is made for a purpose.

…

One objection to the creditor as beneficiary under the primary trust is that theoretically the creditor could use *Saunders v Vautier* (1841) 4 Beav 115 to determine the trust, take the fund and nevertheless still claim to be paid for the debt. The possibility is more theoretical than real, and the same objection could in theory be made to Lord Millett's analysis of a resulting trust if the lender were to reclaim the trust fund under *Saunders v Vautier* and still claim repayment under the contract. In the unlikely event that any such claim were to be made, it is hard to conceive that the court would allow double recovery, and there might well be scope for arguing that the claim was an abuse of process.

Lord Wilberforce's analysis was applied by Megarry J in *Re Northern Developments (Holdings) Ltd*. Although Lord Millett criticized this decision in Twinsectra, neither he nor any of the other Lords went so far as to say that the case was wrongly decided. It was also applied by Peter Gibson J in *Carreras Rothmans v Freeman Matthews Treasure,* [1985] Ch 207 where the primary trust was actually enforced by the court.

…

… The nature of a Quistclose trust may vary according to the circumstances, as Lord Millett now appears to accept.

It is submitted that *where a loan is made for the purpose of paving identified existing creditors. Lord Wilberforce's analysis is correct and will still apply. If the borrower becomes insolvent and there is a dispute between those creditors and the lenders, the creditors*

should succeed. The primary purpose is still capable of being carried out. It is further submitted that the same will apply where the loan is for future identifiable creditors. Thus, eg in Re EVTR, if the equipment had been delivered but no payment had been made to Quantel before the borrower went into liquidation, Quantel would have been entitled to the borrowed money, and should not have had to prove as unsecured creditors in the liquidation. This would not have constituted an unlawful preference since the borrower never had a beneficial interest in the money. In any event, the basis of an unlawful preference is that a creditor has been preferred to other creditors with the result that the pot for them is reduced. In the situation above, the pot would not have been reduced. All that would happen would be that the lender would have to claim as an unsecured creditor instead of the creditor who had been paid. The amount due to the creditors in an insolvency would be the same. Instead of the trade creditors being creditors in the insolvency, the lender would be one of the creditors for the same sum.

Such a result would not only accord with the law as stated in Quistclose. It would produce a more just result than holding that the beneficial interest never left the lender. Although it is useful to have lenders who are willing to try to support ailing businesses, they will normally charge a higher rate of interest because of the risk of insolvency, and if they choose to take the risk of lending without security, it is not equitable that they should take precedence over *creditors who have provided consideration, possibly without knowledge of the borrower's parlous financial position, or perhaps even with an assurance by the borrower that the borrower had been put in funds to pay them.* If the primary purpose is not capable of being carried out, or there were no identifiable creditors at the time of the loan, the monies will still result back to the lenders, and the liquidators or trustee in bankruptcy will have no claim to them. (Emphasis added.)

[53] With respect we find the arguments of the learned author persuasive if a fair and just result is the goal as it should be in the court of equity. Thus, we find no reason why the prepositions as suggested by the learned author should not be adopted by a court of equity.

[54] We are particularly inclined to agree and accept the preposition of principle that 'where a loan is made for the purpose of paying identified existing creditors, Lord Wilberforce's analysis is correct and will still apply. If the borrower becomes insolvent and there is a dispute between those creditors and the lenders, the creditors should succeed. The primary purpose is still capable of being carried out'. In other words the two trusts approach: 'a primary trust in favour of the creditors and a secondary trust in favour of the lenders' of Lord Wilberforce is still relevant depending on the facts of the particular case.

[55] In *Chwee Kin Keong and Others v Digilandmall.com Pte Ltd* [2005] 1 SLR(R) 502, (Singapore Court of Appeal) Chao Hick Tin JA at para 77 said this:

We do not think this court should approach the issue in a rigid and dogmatic fashion. Equity is dynamic. A great attribute, thus an advantage, of equity, is its flexibility to achieve the ends of justice.

FINDINGS OF THE COURT

[56] Reverting therefore to the present case, as indicated above, the leave question accepted, albeit impliedly as a fact or at least presupposes, the existence of a Quistclose trust based on the given facts and circumstances. As such the said monies would not be a subject in the winding up proceeding of the appellant. Further, it is therefore not necessary for us to deal with the view expressed by the majority in the Court of Appeal in the second OS on the issue of Quistclose trust. Thus, the remaining issue is whether the respondent can claim the said monies. It did not provide or pay for it. Meanwhile, it is not in dispute that the shareholders had their shares and could not expect the return of their subscriptions upon the winding up of the appellant.

[57] The appellant had earmarked the said monies (specific property) which it received before it became insolvent and before the order of winding up was granted. The said monies came from the subscriptions of the shareholders of the appellant for the rights issue shares. Further, the shareholders were well informed of the intended purpose of the said monies through the circular and the letter to entitled shareholders dated 30 October 2007. In other words, even the shareholders knew that the intended purpose of a portion of the subscriptions received by the appellant would be for the respondent. Thus the intention was made clear. The subscriptions received which included the said monies was credited into a special account called the 'PECD RIGHTS ISSUE Account'.

[58] Meanwhile, the respondent is a specific creditor and thus an identified creditor to receive the said monies as the trustee of the noteholders. And it is still capable of receiving the said monies. At the behest of the appellant and in reliance upon the assurance and promise given by the appellant, the respondent granted indulgence to the subsidiary. Further, in similar position as the creditors in *Re Northern Developments Holdings Ltd* the respondent knew and was assured, promised and informed by the appellant that it would be paid upon receipt of the said monies. In other words the primary trust was and is 'still capable of being carried out'.

[59] As such, for the above reasons and applying the accepted preposition of principle discussed above we are of the view that the respondent has acquired the beneficial interest in the said monies. The 'primary trust was a purpose trust enforceable' by the respondent as the trustee of the noteholders, the actual creditors, 'for whose benefit the trust was created'. The respondent is therefore

'capable of enforcing the trust on *Re Denley's Trust Deed; Holman v H H Martyn & Co Ltd* [1969] 1 Ch 373' (The beneficiary principle, that is, the trust would be valid so long as there is a person benefitting from the trust who can be described as having a direct and tangible interest, so as to have the locus standi to enforce the trust). Indeed Lord Millett in *Twinsectra Ltd v Yardley* at p 826 said that it was not necessary to explore the position (That is 'where, pending its application by B (the payee), is the beneficial interest in the money?'):

> … while the primary purpose was still capable of being carried out and Lord Wilberforce's observations must be read in that light. (It should be noted the use of the phrase 'primary purpose' as opposed to 'primary trust' employed by Lord Wilberforce in Quistclose case).

[60] In coming with our view we have taken into account the persuasive decisions of Megarry V-C in *Re Northern Developments Holdings Ltd* and of Peter Gibson J in *Carreras Rothmans Ltd v Freeman Mathews Treasure Ltd* as well the arguments and prepositions in Nathan's article. In fact even Lord Millett in his article entitled 'The Quistclose Trust: Who Can Enforce It?' (It is noted that the emphasis was on the intention of the provider of the money) flirted with the 'possibility of third parties being the beneficiaries of such a trust: 'If A's intention was to benefit C, or his object would be frustrated if he were to retain a power of revocation, the transaction will create an irrevocable trust in favour of C, enforceable by C but not by A. The beneficial interest in the trust property will be in C'.

[61] Accordingly, based on the present position of the concept of Quistclose trust as discussed above, with respect, we find no merit in the submission of learned counsel for the appellant that 'the concept of primary trust and secondary trust as propounded in *Barclays Bank Ltd v Quistclose Investments Ltd* (supra) had already been rejected in *Twinsectra Ltd v. Yardley & Others* (supra) yet the Court of Appeal only gave it a cusory approach'.

[62] Indeed as discussed above, the 'fact remains that the House of Lords decision in *Quistclose* was a unanimous one, which has not been overruled. Even Lord Millett merely said that there were 'several difficulties' with Lord Wilberforce's analysis, as applied in *Re Northern Developments (Holdings) Ltd*' (see Nathan's article). (Emphasis added.)

[63] We also find that the facts and circumstances of this case require the exercise of 'flexibility to achieve the ends of justice'. To allow the liquidators of the appellant to keep the said monies would be grossly unfair and unjust to the noteholders and the respondent as their trustee.

[64] Further, it will be unfair, unjust and against good conscience if the

liquidators of the appellant are allowed to keep the said monies. The appellant had the said monies before the winding up order was made. It could have easily paid the respondent. But it just refused to do so. It completely ignored its obligation and assurance given to the respondent. In its Debts Restructuring Scheme it went so far as to include the said monies as part of the RM35m in cash to be distributed to its creditors including the respondent. 'Equity's intervention is more principled than this. It is unconscionable for a man to obtain money on terms as to its application and then disregard the terms on which he received it. Such conduct goes beyond a mere breach of contract'. (Lord Millett in *Twinsectra Ltd v Yardley* at para 76).

[65] The appellant had secured the agreement and indulgence from the respondent not to proceed with legal action against the subsidiary in default. Such agreement and indulgence were given in exchange for the letter of undertaking containing the assurance that the said monies would be paid to the respondent. Obviously, the respondent and the noteholders held on to such representation and assurance in not proceeding with the legal action against the subsidiary when it was still in business. In our view, due to the representation made and the forbearance rendered it was therefore not a simple ordinary commercial arrangement.

[66] Accordingly, there is merit in the submission of learned counsel for the respondent that the 'purpose of the sum RM30 million was clearly specified, that is, to pay dividends to the Noteholders and such purpose was known to all relevant parties. The appellant did not provide the said sum of RM30 million and as such the appellant did not have the beneficial interest in it that would have entitled the appellant to make a claim for it in the event the specific purpose could not be fulfilled'.

[67] We are of course conscious that another issue may arise if the primary trust fails, namely, who will be entitled to the said monies since the appellant does not have the beneficial interest. Fortunately on the facts and circumstances of this case we need not address such an issue here. In any event, courts must always be vigilant to prevent abuse of the concept.

[68] We are therefore of the view that the learned High Court judge was perfectly correct to make the order as she did against the appellant in respect of

A the payment of the said monies to the respondent.

CONCLUSION

B **[69]** For the above reasons we answer the leave question in the affirmative. In the upshot this appeal is dismissed with costs.

Appeal dismissed with costs.

C Reported by Ashok Kumar

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